

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 04-35346
)	
John Michael McKinley,)	Chapter 7
)	
Debtor.)	
)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER
REGARDING TRUSTEE'S OBJECTION TO EXEMPTION

This case is before the court on the Trustee's Motion Objecting to Exemptions ("Motion") [Doc. # 8] and Debtor's response [Doc. # 11]. A hearing was held on the Motion at which the Trustee appeared in person and counsel for Debtor appeared telephonically. The issue presented to the court is whether Debtor may exempt under Ohio Revised Code § 2329.66(A)(4) and (A)(18) garnished wages recovered by the Trustee as preferential transfers. For the reasons that follow, the court finds Debtor's exemptions proper. As such, the Trustee's motion will be denied.

FACTUAL BACKGROUND

The following facts are not in dispute. Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on June 24, 2004. In his petition, he listed wage garnishments constituting preferential transfers in the amount of \$1,021.83 as an asset of the estate. In addition, on Schedule C, he claimed exemptions in the garnished wages under Ohio Revised Code § 2329.66(A)(4)(a) and (A)(18) in the amounts of \$373.57 and \$300.00, respectively. It is also undisputed that the Trustee has already taken steps to avoid the preferential wage garnishments.

LAW AND ANALYSIS

The Trustee objects to the exemptions claimed under § 2329.66(A)(4)(a) and (A)(18) in the garnished wages that she apparently is attempting to recover.¹ The Trustee's primary argument is that property avoided by a trustee under 11 U.S.C. § 547 may not be claimed as exempt property. She also

¹ The parties agree that the Trustee has attempted to recover the garnished wages as preferential transfers. It is unclear, however, whether the wages have yet been recovered.

argues that under the terms of the Ohio exemption statute, Debtor is not entitled to an exemption. For the reasons that follow, the Trustee's arguments are not well taken.

First, the Trustee challenges the ability of a debtor to exempt property that was recovered by a trustee under 11 U.S.C. § 550 after the transfer of the property was avoided by the trustee under § 547. She argues that such recoveries are for the benefit of the estate, not of the debtor, and that to allow a debtor to benefit from the trustee's actions and labor is not equitable. While it is true that § 550(a) provides that "[e]xcept as otherwise provided in this section, to the extent that a transfer is avoided under section . . . 547 . . . of this title, the trustee *may recover for the benefit of the estate*, the property transferred . . . ,” § 522(g) creates an exception allowing such recoveries to benefit the debtor. Section 522(g) provides in relevant part as follows:

Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if –

- (1) (A) such transfer was not a voluntary transfer of such property by the debtor; and
- (B) the debtor did not conceal such property. . . .

11 U.S.C. § 522(g). The Trustee relies on the fact that § 522(g) does not specifically allow an exemption in property subject to a transfer avoided by a trustee under § 547. But § 522(g) does allow a debtor to exempt property that is recovered under § 550, to the extent that a transfer is avoided under § 547. The Sixth Circuit holds that avoidance of problematic transfers, such as under 11 U.S.C. § 544, and subsequent recovery of the property or the value of the property transferred under § 550 are two separate concepts. *See Suhar v. Burns (In re Burns)*, 322 F.3d 421, 428 (6th Cir. 2003). Where the creditor's interest being avoided is nonpossessory, such as a lien, a trustee's desired result may be accomplished through avoidance alone and the trustee need not seek recovery under § 550. *Id.* In this case, however, the creditor's interest in the property in issue is tangible and possessory, and the Chapter 7 trustee must therefore seek both avoidance under § 547 and then recovery from the creditor of the amount transferred under § 550. This is true whether the Trustee accomplishes recovery with or without the filing of a lawsuit; the legal authority underpinning her actions will be the same in any event. Therefore, the circumstances of this case fit squarely within the express statutory language of § 522(g), because recovery of the garnished wages must

be accomplished under § 550 after avoidance of their transfer under § 547.

There are two exceptions in § 522(g) to the allowance of an exemption in recovered property. Neither exception applies in this case. The wage garnishments at issue in this case were not voluntary transfers, *see Maus v. Joint Township Dist. Mem. Hosp. (In re Maus)*, 282 B.R. 836, 838 (Bankr. N.D.

Ohio 2002), and Debtor did not attempt to conceal the wages as they were clearly disclosed in his bankruptcy petition. Debtor has therefore satisfied the requirements of § 522(g).

The court rejects the Trustee's argument that it would be inequitable to allow Debtor to benefit from the Trustee's effort to recover the garnished wages. As one bankruptcy treatise explains:

By authorizing the debtor to claim as exempt property that the trustee has recovered, section 522(g) furthers the goal of exemption law generally. Section 522(g) will most likely come into play when the property being recovered exceeds in value the amount that a debtor may claim as exempt. In that circumstance, the trustee would recover the property, and the debtor would be able to exempt a portion from that recovered amount as exempt. The value of the property in excess of the exemption would remain in the bankruptcy estate and would be distributed to creditors at the end of the case.

4 Alan N. Resnick, et al., *Collier on Bankruptcy* ¶ 522.12[1] (15th ed. 2004). Presumably a trustee would not pursue recovery of avoidable transfers unless it would benefit the bankruptcy estate and would leave any such avoidance and recovery for debtors and their counsel to pursue under 522(h).² *See Id.* at ¶ 522.12[2][a] (recognizing that “[i]t is the unusual case where the trustee would be recovering property that the debtor would claim as either wholly or partially exempt”). Nevertheless, when that circumstance occurs, the property that the debtor exempts under § 522 is liable for the aliquot share of the trustee's costs and expenses of avoiding the transfer. 11 U.S.C. § 522(k)(1). Thus, the equities involved in the exemption of property recovered as avoidable transfers have been addressed by the various provisions of § 522.

The Trustee also argues that the garnished wages do not constitute property exempted by Ohio Revised Code § 2329.66(A)(4)(a). That section exempts, among other things, a person's interest, “not to exceed four hundred dollars, in cash on hand, money due and payable, [and] money to become due within ninety days. . . .,” *id.*, which the Trustee argues does not apply in this case since the garnished funds are in the control of the creditor and are not due back to Debtor. The court disagrees. Section 522(g) permits the exemption “to the extent that the debtor could have exempted such property under subsection

² Section 522(h) authorizes debtors avoid certain transfers and to recover otherwise exempt assets from creditors who have received avoidable transfers if the trustee does not attempt to avoid those transfers. 11 U.S.C. 522(h).

(b) of this section if such property had not been transferred.” There is no doubt that Debtor could have exempted the wages if they had not been garnished.

Finally, to the extent the Trustee also argues that the Ohio exemption statute limits a debtor’s exemption in garnished wages to the exemption provided in Ohio Revised Code § 2329(a)(13),³ the argument is not well taken. While § 2329.66(A)(13) may provide the only exemption available in garnished wages outside of bankruptcy, the Ohio statute expressly provides for additional exemptions that may be claimed in bankruptcy proceedings. Specifically, § 2329.66(A)(4)(a) provides a \$400 exemption to be applied “only in bankruptcy proceedings” and further provides that this exemption “may include the portion of personal earnings that is not exempt under division (A)(13) of this section.” In addition, the Ohio exemption statute provides a “wild card” exemption of \$400 “in *any* property” that is also applicable “only in bankruptcy proceedings.” Ohio Rev. Code § 2329.66(A)(18) (emphasis added). Thus, the exemptions under § 2329.66(A)(4)(a) and (A)(18) claimed by Debtor in the garnished wages recovered by the Trustee are clearly contemplated by the Ohio exemption statute.

As indicated above, § 522(k)(1) provides that property recovered by a trustee under § 522(g) and exempted by a debtor is liable for an aliquot share of the costs and expenses incurred in recovery. The record does not show whether the Trustee incurred any costs and expenses in recovering the garnished wages. But based on the court’s decision that Debtor is entitled to receive and exempt part of the garnished wages recovered or to be recovered by the Trustee, she may recover an aliquot share of any such costs and expenses from the exempt amount under § 522(k)(1) before payment to Debtor.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Trustee’s Motion Objecting to Exemptions [Doc. # 8] be, and hereby is, **DENIED**.

Mary Ann Whipple

³ Section 2329.66(A)(13) provides an exemption at the time the wages are garnished equal to an amount determined by a multiple of the federal minimum hourly wage or seventy-five percent of the disposable earnings owed to the debtor, whichever is greater. Ohio Rev. Code § 2329.66(A)(13).

